

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

Key Emarri Burton,

Petitioner

v.

Gabriela Najera, *et al.*,

Respondents

Case No.: 2:23-cv-00753-APG-BNW

**Order Denying Motion to Stay**

[ECF No. 21]

In his *pro se* 28 U.S.C. § 2254 petition for a writ of habeas corpus, Key Emarri Burton challenges his conviction pursuant to a guilty plea of attempted murder, arguing that his plea counsel rendered ineffective assistance. ECF No. 6. The court granted the respondents' motion to dismiss because both grounds are unexhausted. ECF No. 20. I directed Burton to either voluntarily dismiss this petition or to move for a stay and abeyance in order to return to state court to exhaust his claims. *Id.* Burton has moved for a stay. ECF No. 21. Because he fails to demonstrate good cause for a stay, I deny the motion and dismiss the petition.

**I. Background**

In March 2020, Burton pleaded guilty to attempted murder in Eighth Judicial District Court (Clark County) Nevada. Exh. 27.<sup>1</sup> The charges stemmed from an incident where Burton and his co-defendant attempted to rob a house in Las Vegas. When the resident answered the front door, Burton shot him several times, seriously injuring him. The state district court sentenced him to a term of 96 to 240 months. Exh. 28. Judgment of conviction was entered in June 2020. *Id.* Burton did not file a direct appeal. The state district court denied Burton's postconviction habeas

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<sup>1</sup> Exhibits referenced in this order are exhibits to the respondents' motion to dismiss, ECF No. 9, and are found at ECF Nos. 10-11.

1 corpus petition on the merits. Exh. 58. But the Supreme Court of Nevada dismissed his appeal  
2 because he filed it more than a month after the expiration of the 30-day appeal period. Exh. 67.  
3 In April 2023, Burton filed a motion to correct illegal sentence, which the state district court  
4 denied. Exhs. 71, 76. Burton then filed a motion for relief from the judgment under rescission.  
5 Exh. 78. The state district court denied the motion, and the Supreme Court of Nevada dismissed  
6 the appeal because no statute or court rule permits an appeal from an order denying a motion for  
7 relief from the judgment under rescission in a criminal matter. Exh. 95. Burton's federal habeas  
8 petition raises two grounds for relief:

9 Ground One: Burton's trial counsel was ineffective in violation of his Sixth and  
10 Fourteenth Amendment rights for advising Burton to take the plea deal.

11 Ground Two: Trial counsel was ineffective for failing to conduct any investigation,  
12 which would have revealed inconsistencies in the victim's description of the shooter and  
13 would have demonstrated that there was only one shooter.

14 ECF No. 6 at 4-5, 8-10.

15 Because the state appellate court did not adjudicate his appeal of the denial of his  
16 postconviction petition, Burton did not exhaust the federal grounds. *Roettgen v. Copeland*, 33  
17 F.3d 36, 38 (9th Cir. 1994), citing *Castille*, 489 U.S. at 351. The respondents moved to dismiss  
18 the petition as unexhausted. ECF No. 9. Burton did not respond to the motion. The court  
19 granted the motion to dismiss, and Burton now moves for a stay so that he may return to state  
20 court to exhaust his two claims. ECF No. 21.

## 21 II. Motion to Stay -- Legal Standards & Analysis

22 A district court is authorized to stay a habeas action in "limited circumstances" while a  
23 petitioner presents unexhausted claims to the state court. *Rhines v. Weber*, 544 U.S. 269, 273–75  
24 (2005). Under *Rhines*, "a district court must stay a mixed or wholly unexhausted petition only if:  
(1) the petitioner has 'good cause' for his failure to exhaust his claims in state court; (2) the

1 unexhausted claims are potentially meritorious; and (3) there is no indication that the petitioner  
2 intentionally engaged in dilatory litigation tactics.” *Mena v. Long*, 813 F.3d 907, 908 (9th Cir.  
3 2016); *Wooten v. Kirkland*, 540 F.3d 1019, 1023 (9th Cir. 2008) (citing *Rhines*, 544 U.S. at 278).

4 The Ninth Circuit Court of Appeals has acknowledged that the *Rhines* “good cause”  
5 standard does not require “extraordinary circumstances.” *Id.* at 1024 (citing *Jackson v. Roe*, 425  
6 F.3d 654, 661–62 (9th Cir. 2005)). Ineffective assistance of postconviction counsel or a lack of  
7 postconviction counsel can constitute good cause under *Rhines*. See *Blake v. Baker*, 745 F.3d  
8 977, 982–83 (9th Cir. 2014); *Dixon v. Baker*, 847 F.3d 714, 721 (9th Cir. 2017). But courts  
9 “must interpret whether a petitioner has ‘good cause’ for a failure to exhaust in light of the  
10 Supreme Court’s instruction in *Rhines* that the district court should only stay mixed petitions in  
11 ‘limited circumstances.’” *Wooten*, 540 F.3d at 1024 (citing *Jackson*, 425 F.3d at 661). Courts  
12 must also be “mindful that AEDPA aims to encourage the finality of sentences and to encourage  
13 petitioners to exhaust their claims in state court before filing in federal court.” *Id.* (citing *Rhines*,  
14 544 U.S. at 276–77).

15 Here, Burton never filed an opposition or responded to the respondents’ motion to  
16 dismiss in any way. He filed a one-page purported motion to stay that says simply: “stay and  
17 abeyance while I exhaust unexhausted claims to state court.” ECF No. 21. The respondents  
18 oppose, stating that Burton made no attempt to argue that he has “good cause” for failure to  
19 exhaust his claims or that they are potentially meritorious. ECF No. 22. Burton did not file a  
20 reply to the opposition or respond in any way. Burton’s motion for stay must be denied. He  
21 presents no argument, facts or evidence supporting his request for a stay. He does not assert that  
22 the claims are potentially meritorious. No bases have been presented to demonstrate that a stay  
23 is warranted, so I deny the motion. I also, therefore, dismiss the petition without prejudice as  
24 wholly unexhausted.

